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ROSDI HJ ZAKARIA & ANOR

v.

MOHAMAD NASSIR SAID

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HIGH COURT SABAH & SARAWAK, KUCHING
RAVINTHRAN PARAMAGURU JC
[SUIT NO: S-22-132-2005-III/I]
6 OCTOBER 2009

C **SUCCESSION:** *Distribution of estate - Claim to be included in proposed Memorandum of Transfer - Parties of Muslim faith - Whether claim within purview of Syariah Court and not civil court*

D **CIVIL PROCEDURE:** *Jurisdiction - Distribution of estate - Claim to be included in proposed Memorandum of Transfer - Parties of Muslim faith - Whether claim within purview of Syariah Court and not civil court*

The plaintiffs sought for a declaration that they had a share in the estate of their late great grandfather, one Hj. Usup. They sought for an order that their names be included in a proposed Memorandum of Transfer with an unspecified undivided share in a piece of land (Lot 117). Hj. Usup was the owner of Lot 117 and another piece of land (Lot 133). He died intestate in 1965 and was survived by eight of his children and many grandchildren and great grandchildren. The plaintiffs and the defendant were his great grandchildren. The plaintiffs came from the lineage of Hj. Usup's daughter whilst the defendant came from the lineage of Hj. Usup's son. Lot 117 was not distributed soon after the death of Hj. Usup according to intestacy rules governing Muslims. The evidence showed that many of Hj. Usup's descendants had continued to live on the land after his demise. It was only after 20 years that Hj. Usup's grandson (the defendant's father) obtained a Letter of Administration ('LA') over Lot 117 and transferred it to himself in his capacity as administrator. However, the defendant's father failed to divide and distribute the estate to his cousins before his death as the plaintiffs had lodged a caveat on the ground that their mother's name was not included in the proposed Memorandum of Transfer. The plaintiffs also claimed that their mother never consented to the defendant's father being appointed as the administrator of Hj. Usup's estate. Further, that their mother had told them that she was assured by the defendant's father that she would get a share in Lot 117. On the other hand, the defendant

claimed that the plaintiffs' mother had been given a share from the proceeds of the sale of Lot 133 and that was why she was not given a share in Lot 117. It was not disputed that all parties were of Muslim faith.

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Held (dismissing the plaintiffs' claim):

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(1) The real issue was not whether the plaintiffs' mother received money in lieu of her share in Lot 133 and whether she was properly excluded from being given a share in Lot 117 but whether the civil court had the power to determine the share of an heir to the estate of a deceased of Muslim faith. (para 5)

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(2) The administration of Hj. Usup's estate was still not completed as Lot 117 was yet to be distributed. Therefore, the defendant's allegation that the plaintiffs' mother received her share from the sale of Lot 133 was irrelevant as there was no evidence that the distribution of the estate of Hj. Usup was completed according to s. 17 of the Administration of Estates Ordinance ('Ordinance'). (para 5)

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(3) The court would have to state the share that the plaintiffs were entitled to in the proposed memorandum of transfer if it were to order the inclusion of the plaintiffs' names in the said memorandum. That would entail the court to exercise jurisdiction in the subject matter of Islamic Law relating to intestacy and succession which was within the purview of the Syariah Court. Paragraph (viii) and (ix) sub-s. 3 of s. 10 of the Sarawak Syariah Court Ordinance clearly placed the division and inheritance of testate or intestate property of a Muslim within the jurisdiction of the Syariah Court. However, it did not place the subject matter of administration of the estate of a deceased person within the Syariah Court's purview which was consistent with the State and Federal legislative lists of the Federal Constitution. (paras 6 & 7)

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(4) The Ordinance did not purport to confer power to the civil court to distribute the estate of a Muslim. Instead s. 17 stated that the administrator must distribute the residue of the estate of the deceased according to "recognised law and custom". Therefore, although the civil court was seized with jurisdiction over the general administration of an estate of a Muslim, it could only give an order to distribute the estate of a Muslim

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- A after the Syariah Court determined the share of the heirs to the estate by the issuance of a *Sijil Faraid*. It followed that the civil courts have jurisdiction over the administration of the estate of a Muslim but not the apportionment of the share of an heir whilst the Syariah Court had jurisdiction only in respect of
- B apportionment of the share of a deceased Muslim but not in respect of the administration of the estate. (paras 9 & 10)
- (5) There was no merit in the plaintiffs' complaint that their mother did not consent to the appointment of the defendant's father as administrator. That was because the plaintiffs did not
- C apply to set aside the LA granted to the defendant's father. Further, the appointment of the defendant's father as administrator was not flawed because s. 8 of the Ordinance placed the defendant's father in priority over the plaintiffs' mother. (paras 12 & 13)
- D
- (6) The sum of the remedies sought by the plaintiffs was for a declaration that they were one of the lawful beneficiaries of Hj. Usup and that they be given a share in Lot 117. Although the evidence established that the plaintiffs and the defendant were
- E the great grandchildren of Hj. Usup, the question whether the plaintiffs had a right to a share and the proportion of their share in Lot 117 was clearly a matter within the purview of the Syariah Court. (para 14)
- F **Case(s) referred to:**
Latifah Mat Zin v. Rosmawati Sharibun & Anor [2007] 5 CLJ 253 FC
(*refd*)
- Legislation referred to:**
- G Administration of Estates Ordinance, ss. 8, 17(c)
Sarawak Syariah Court Ordinance, s. 10(3)
- For the plaintiffs - Norida Sipek; M/s Abdul Rahim, Sarkawi Razak Tready, Fadillah & Co*
For the defendant - Fatmawaty Morshidi; M/s Hamzah & Ong Advocates
- H *Reported by Usha Thiagarajah*
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JUDGMENT**A****Ravinthran Paramaguru JC:****Introduction**

[1] In this suit the plaintiffs are seeking a declaration from the court that they have a share in the estate of their late great grandfather, Hj. Usop bin Said @ Usup bin Sait (Hj. Usup), who passed away in 1965. They are also asking for an order that their names be included in a proposed memorandum of transfer with an unspecified undivided share in the land. The sole asset of the estate of Hj. Usup is a piece of land described as Lot 117, Block 8 Salak District. The current registered proprietor of the land is the defendant. He is also their second cousin. All parties are Muslims. The issues that have arisen are in respect of administration and division of the estate of a deceased Muslim which are governed by both Civil and Syariah Laws.

B**C****D****Summary Of Facts And Events**

[2] Hj. Usup was the original the owner of Lot 117 Block 8 Salak District which is the bone of contention in this case. According to the defendant's witnesses he owned two pieces of land, ie, Lot 117 and Lot 133. He died intestate in 1965. He was survived by eight of his children and many grandchildren and great grandchildren according to the family tree which is not disputed by the parties. The plaintiffs and the defendant are his great grandchildren. The plaintiffs are descended through Hj. Usup's daughter by the name of Habsah who had five children of which Mahani, the plaintiffs' mother is one of them. The defendant is descended through one of Hj. Usup's sons (Derahaman). There is no evidence why Lot 117 was not distributed soon after the death of its owner according to intestacy rules governing Muslims. From the evidence, many of the descendants of Hj. Usup continued to live on the said land. However more than 20 years later on 4 April 1986, one of his grandsons by the name of Said bin Hj. Abd Rahman (the father of the defendant) obtained a Letter of Administration over the said piece of land. On 30 June 1987, he transferred the said land to himself in his capacity as administrator. However, he did not manage to divide and distribute the estate to his cousins because the plaintiffs (the children of his first cousin Mahani) had lodged a

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A caveat on the land as their mother's name was not included in the proposed Memorandum of Transfer. Said bin Hj. Abd Rahman died on 13 May 1990 without distributing Lot 117. Upon his death his son, the defendant herein, obtained Letters of Administration over his father's estate. However he was unable to distribute it to his eight uncles, aunts and himself (1/9 share each) as per proposed Memorandum of Transfer (see page 17 of Bundle of Agreed Documents) because of the existence of the caveat. The plaintiffs in this Suit claim they have a right to share in Lot 117. The prayers they seek are as follows:

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- (a) That the plaintiffs be declared as the legitimate beneficiaries of the descendants of the late Hj. Usup bin Said and be declared to become the rightful registered proprietors with all other beneficiaries who are entitled;
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- (b) That the Defendant be ordered to include the names of the Plaintiffs in the Memorandum of Transfer which is purported to transfer the said Land to all the purported Transferees'
 - (c) That the Defendant is ordered to transfer all his registered interest over Lot 117, Block 8, Salak Land District to all the purported Transferees including the plaintiffs;
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[3] The plaintiffs called four witnesses to testify on their behalf. The plaintiffs' case is simply that, as the great-grandchildren of Hj. Usup, they have a share in the said land. However, they also testified that their mother never consented to the father of the defendant being appointed as the administrator of the estate of Hj. Usup in 1986. Their mother also told them that she was assured by the father of the defendant that she will get a share in Lot 117. The third witness is a second cousin of the plaintiffs. He said that he received RM10,000 from the proceeds of the sale of Lot 133 from the father of the defendant. He could not say who else had a share in Lot 133. However, during re-examination, he said that the plaintiffs' mother did not have a share in Lot 133. The fourth witness was the granddaughter in law of Hj. Usup. Her evidence is that her husband was asked to sign a document by the father of the defendant to state that he is a beneficiary.

[4] The defendant called five witnesses to testify on his behalf. The gist of their evidence is that the mother of the plaintiffs had been given a share from the proceeds of the sale of Lot 133 and that was why she does not have a share in Lot 117. The defendant

said that his father gave RM3,000 to the mother of the plaintiffs after Lot 133 was sold. That was the reason she did not have a share in Lot 117. The second witness for the defendant was his 89 year old uncle. He now lives on Lot 117. He said he allowed the plaintiffs to build a house on his plot of land because they had no place to go. He said that the plaintiffs' mother had been given a share of Lot 133 and therefore she was excluded from Lot 117. The other witnesses are the cousins of the defendants. Their evidence were similar. They all heard from an elder relative that the mother of the plaintiffs had no right to a share in Lot 117 because she had been given a share in Lot 133. It must be noted that all the parties including the plaintiffs gave hearsay evidence as they only related what they heard from older relatives about the intention of Hj. Usup and about what happened when Lot 133 was sold.

[5] After having heard the evidence and submission, I am of the opinion that the real issue in this case is not whether the mother of plaintiffs had received money *in lieu* of her share in Lot 133 and whether she was properly excluded from being given a share in Lot 117. The real issue is whether the civil court has power to determine the share of an heir to the estate of a deceased of Muslim faith. There is no dispute that Hj. Usup died intestate and that all the parties are Muslims. The other crucial fact is that the administration of the estate of the Hj. Usup is still not completed. This is because Lot 117 is the only asset listed in the Letters of Administration that was granted to the father of the defendant and it has yet to be distributed. The land title is still in the name of the father of the defendant who transferred it to his name in his capacity as administrator. Therefore the allegation of the defendants' witnesses that the plaintiffs' mother had received her share from the sale of another land is irrelevant as there is no evidence that the distribution of the estate of Hj. Usup was completed according to s. 17 of the Administration of Estates Ordinance. The witnesses' testimonies were almost exclusively confined to the issue whether the mother of the plaintiffs was excluded because she allegedly received the sum of RM3,000 as her share for the sale of another land, ie, Lot 133 which also belonged to Hj. Usup. It is common ground that Hj. Usup died intestate. Therefore his estate must be subjected to s. 17 of the Administration of Estates Ordinance after the grant of Letters of Administration. Section 17 reads as follow:

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A 17. On obtaining probate or letters of administration the executor or administrator, as the case may be, shall forthwith:

(a) Collect and recover all the property, assets and effects covered by the grant;

B (b) Discharge there out all the debts due by the deceased which are legally recoverable; and

(c) Distribute the residue of the estate among the beneficiaries or heirs of the deceased, according to the will of the deceased or, as the case may be, in the shares to which they are entitled by recognized law or custom:

C

Provided that before distributing the residue of the estate the executor or administrator may reimburse himself out of the assets of the estate in respect of any monies paid by him on account of funeral expenses, Estate Duty, other probate expenses, and any other necessary expenses incurred by him on behalf of the estate.

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[6] There is no evidence to the effect that the father of defendant had distributed Lot 117 under s. 17(c) of the Administration of Estates Ordinance. However, in this suit the plaintiffs are claiming for a declaration that their name should be included in the draft Memorandum of Transfer by which the defendant intends to distribute Lot 117 to himself and eight of his cousins and uncles. If the court were to order the inclusion of the plaintiffs' name in the proposed Memorandum of Transfer, it has to state the share that they are entitled in the estate of Hj. Usup. A proposed transferee's name cannot be entered into a Memorandum of Transfer, which is a statutory form, without stating the share that is being transferred to him or her. Therefore if this court were to accede to the prayers sought, it would be exercising jurisdiction in the subject matter of Islamic Law relating to intestacy and succession. It is impossible to avoid this conclusion as Hj. Usup had died intestate and Lot 117 which comprises his estate has yet to be distributed among his heirs. Section 10(3) of the Sarawak Syariah Court Ordinance reads as follows:

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(3) The Syariah High Court shall:

(a) ...

I (b) In its civil jurisdiction, hear and determine all actions and proceedings if all the parties to the actions or proceedings are Muslims and the actions or proceedings relate to:

- (i) ... A
 - (ii) ...
 - (iii) ...
 - (iv) ... B
 - (v) ...
 - (vi) ...
 - (vii) ... C
 - (viii) division and inheritance of testate or intestate property;
 - (ix) the determination of the persons entitled to share in the estate of a deceased Muslim or the shares to which such persons are respectively entitled; D
 - (x) other matters in respect of which jurisdiction is conferred by any written law.
- [7]** Paragraph (viii) and (ix) of sub-section (3) clearly places the division and inheritance of testate or intestate property of Muslim within the jurisdiction of the Syariah Court. However, it does not place the subject matter of administration of the estate of a deceased person within the purview of the Syariah Court. This is consistent with State and Federal legislative lists of Federal Constitution. In para. 1 of List II (State) of the Federal Constitution, the following subject matter is found: E
- ... Islamic law relating to succession, testate and intestate.
- [8]** Paragraph 1 of List II also contains the following subject matter: F
- the constitution, organization and procedure of Syariah courts G
- [9]** This means that the State Legislature of Sarawak may establish a Syariah Court and vest it with jurisdiction in the above mentioned subject matter (as discussed by the Federal Court in *Latifah Mat Zin v. Rosmawati Sharibun & Anor* [2007] 5 CLJ 253). The Sarawak Syariah Court Ordinance is presumably such a law that has vested jurisdiction in the Syariah court on the subject matter of division of property of a person of the Islamic faith. In the premises, this court has no power to order the apportionment of any share of H
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- A Lot 117 to the plaintiffs as that is within the exclusive jurisdiction of the Syariah Court. However the subject matter of probate and administration has been placed in the Federal List. In Sarawak, the prevailing law on probate and administration is the Administration of Estate Ordinance which is a statute of general application.
- B However the Ordinance does not purport to confer power to the civil court to distribute the estate of a Muslim. Instead s. 17 states that the administrator must distribute the residue of the estate of the deceased according to the “recognised law and custom”.
- C Therefore, although the civil court is seized with jurisdiction over the general administration of an estate of a Muslim, it can give an order to distribute the estate of a Muslim (such as a vesting order in the case of landed property) only after the Syariah Court has determined the share of the heirs to the estate by issuance of a Sijil Faraid. The Syariah Court Ordinance 2001 does not purport to give
- D the power over the administration of the estate of a Muslim to the Syariah Court. In *Latifah’s* case (*supra*), the Federal Court recognised a situation where:

- E ... neither court has jurisdiction and in which some of the issues fall within the jurisdiction of the civil court while the rest fall within the jurisdiction of the syariah court.

- [10] This case falls under the above situation. The civil courts has jurisdiction over the administration of the estate of a Muslim but not the apportionment of the share of an heir. On the other hand
- F the Syariah court has jurisdiction only in respect of apportionment of the share of a deceased Muslim but not in respect of the administration of the estate. Therefore as suggested by the Federal Court in the above mentioned case:

- G Until the problem is solved by the legislature, it appears that the only way out now is, if in a case in the civil court, an Islamic law issue arises, which is within the jurisdiction of the syariah court, the party raising the issue should file a case in the syariah court solely for the determination of that issue and the decision of the syariah court on that issue should then be applied by the civil court in the
- H determination of the case. But, this is only possible if both parties are Muslims.

- [11] In the above case, an issue arose whether monies in the joint bank account of the deceased and his third wife (the appellant)
- I constituted ‘hibah’ (*inter vivos* gift). The daughters (the respondents) of the second wife had petitioned the civil High Court

for Letter of Administration. While the granting of Letters of Administration fell within the jurisdiction of the civil High Court, the power to determine whether monies constituted 'hibah' did not. The High Court held that there was no 'hibah' made in favour of the appellant. The Court of Appeal held that the High Court did not have jurisdiction to determine the issue. The Federal Court agreed that the issue whether the monies were 'hibah' fell within the jurisdiction of the Syariah court. The Federal Court recognised that matters of estate administration fell under jurisdiction of the civil court whereas the division of property held under the estate of the Muslim deceased fell within the purview of the Syariah Court. It is for this reason that the administrator should obtain a Sijil Faraid before applying for a vesting order if the estate comprises landed property. The observation of the Federal Court of the above practice is as follows:

In the case of letters of administration (again I am only referring to non-small estates), an application is made to the civil High Court for the grant of a letter of administration. When the letter of administration is obtained, the administrator is appointed, and in case of an estate of a Muslim, the administrator will obtain a "Sijil Faraid" from the syariah court which states who are the beneficiaries and their respective shares, in accordance with Islamic law. If the estate consists of immovable property, another application is made to the civil High Court for a vesting order. All that the civil High Court does in such an application is that, being satisfied with all the procedural requirements, the civil High Court makes a vesting order in accordance with the "Sijil Faraid". This second application is not necessary where the assets to be distributed are movable assets. However, the administrator still requires a "Sijil Faraid" for purpose of distribution.

Whether Letters Of Administration Should Be Set Aside?

[12] The Letters of Administration was granted to the father of the defendant in 1986. In her submissions, counsel for plaintiffs challenged the issuance of the Letters of Administration as the mother of the plaintiff who is the granddaughter of Hj. Usup allegedly never agreed to the appointment of Hj. Said as administrator. In my opinion, the court should not consider this submission as the plaintiffs did not apply to set aside the Letters of Administration in their Originating Summons. Furthermore, even if the mother of the defendants did not consent to the appointment

- A of Hj. Said (father of the defendant) as the administrator, the appointment is not flawed. This is because s. 8 of the Administration of Estates Ordinance clearly places the “deceased’s widower” and “male heirs” above others in the order of priority in respect of the right to apply for Letters of Administration. Sections
- B 8 reads as follows:

Persons entitled to letters of administration.

- C 8. The following persons, if of full age and of sound mind, **are entitled in the order stated** to letters of administration to a deceased person’s estate:

- (a) the deceased’s widower;
- (b) the male heirs of the deceased;
- D (c) the deceased’s father;
- (d) the brother or brothers of the whole blood of the deceased;
- (e) the deceased’s widow (or primary widow if more than one);
- E (f) the deceased’s nearest male relative;
- (g) the deceased’s nearest female relative;
- (h) any creditor of the deceased, who shall enter into a bond for such amount and with such sureties, or has furnished such security, as the Probate Officer shall require. (emphasis added)
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- G [13] The words “are entitled in the order stated” gives priority to certain heirs over others. Therefore if an heir in the lower order wishes to apply for Letters of Administration he or she may need the consent of an heir in the higher order by way of a letter of renunciation. However if the converse holds true, it would render the words “in the order stated” superfluous and meaningless. Both Hj. Said and the mother of the plaintiffs are the grand children of Hj. Usup. However as a male heir, Hj. Said has precedence over the mother of the plaintiffs in respect of the right to apply for Letters
- H of Administration of Hj. Usup. In the premise, the complaint of the plaintiffs that their mother did not consent to the appointment of Hj. Said as the administrator is without merit.

I

Decision**A**

[14] The sum of the remedies sought by the plaintiffs is for a declaration that they are one of the lawful beneficiaries of Hj. Usup and that they be given a share of Lot 117. The uncontested evidence establishes that the plaintiffs and the defendant are the great grandchildren of Hj. Usup. However the question whether the plaintiffs have a right to a share and the proportion of their share in Lot 117 is clearly a matter within the purview of the Syariah Court.

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[15] I shall therefore dismiss the claim of the plaintiffs. Each party to bear its own costs.

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